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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 652

JAMES A. RADFORD,
Appellant,
VERSUS
RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma, and JOHN D. CONNER, State Treasurer of the State of Oklahoma,
Appellees.

THE JURISDICTIONAL STATEMENT, THE NOTICE OF APPEAL, AND THE RECORD ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (JUDGES MURRAH, RIZLEY AND WALLACE, PRESIDING) TO THE SUPREME COURT OF THE UNITED STATES

SID WHITE,
445 Commerce Exchange Building,
Oklahoma City 2, Oklahoma.
Attorney for Appellant,

December, 1956.

HITTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 8-8780

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In the
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No. .....

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RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma, and JOHN D. CONNER, State Treasurer of the State of Oklahoma,

Appellees.

JURISDICTIONAL STATEMENT

Appellant commenced by complaint in the United States District Court for the Western District of Oklahoma his action to redress the discriminatory apportionment of the State of Oklahoma for legislative purposes under pretense of obeying the constitution of said state, which said complaint appears in the appended record at pages i to vii.

That thereafter appellant filed in said cause his *Application for Permission to Make Additional Parties Defendant and for Leave to File Amendment to Complaint;* which said pleading appears in the appended record at pages vii to viii.

That then on the 31st day of July, 1956, the court entered an order permitting appellant to make said additional parties defendant and to file said amended complaint; which said order appears at appended record pages viii to ix.

That then appellant filed his *Amendment to Complaint;* which said amendment appears in the appended record at pages ix to xii.

That then the appellees filed their joint *Motion to Dismiss;* which appears in the appended record at pages xii to xiv.

That a three-judge court was constituted to hear the issues thus presented; appended record page xv.

That on the 2nd day of November, 1956, said *Motion to Dismiss* was sustained and the order sustaining the same appears in the appended record at pages xxxi to xxxii.

That two opinions were written by the judges; one by Judge A. P. Murrah, concurred in by Judge Ross Rizley, and it appears at appended record page xvi; denying relief as a matter of federal judicial policy. The other by Judge Wallace, to whom the cause was originally assigned, and it appears at appended record page xxii; supports appellant's position and is invoked as authority for this appeal.

That appellant expressed in his Notice of Appeal, as the questions presented, the following:

"(1) Having found that plaintiff was entitled to have the State of Oklahoma reapportioned for the purpose of electing legislative officers, was the trial court bound to provide him a remedy?

"(2) Does apportionment or reapportionment as reflected by this record deny plaintiff the equal protection of the law and due process of law as guaranteed by the Constitution of the United States?

"(3) Does apportionment or reapportionment as disclosed by this record deny plaintiff a fair and equal election as guaranteed by the Constitution of the United States?

"(4) Are the courts of the United States bound by the Constitution of the United States to provide plaintiff a remedy against a wrongful, unlawful or discriminatory apportionment of the State of Oklahoma for the purpose of electing a lawmaking body?

"(5) Does this discriminatory practice deprive plaintiff of a government 'republican in form' as guaranteed by the Constitution of the United States, and are the federal courts bound by said constitution to compel such government for plaintiff at the hands of the state officers because of said provision and other mandates of the national constitution?"

That, in order to avoid overlooking anything, appellant expresses these five questions as presented by this appeal. In no mean or carping spirit, I ask leave to summarize them as follows: IN THIS DAY WHEN SO MUCH STRESS IS PLACED BY FEDERAL COURTS UPON THE CIVIL RIGHTS OF MINORITIES (ESPECIALLY THE NEGROES) ARE THESE COURTS IMPOTENT TO ENTERTAIN THE SUIT OF A WHITE MAN BROUGHT TO END DISCRIMINATION AGAINST ELECTORS BY ADMINISTERING THE CONSTITUTIONAL PROVISIONS OF THE STATE IN SUCH A

MANNER AS TO DEPRIVE LARGE COMMUNITIES OF FREE AND EQUAL ELECTIONS AND OF EQUAL VOICES IN THE SELECTION OF THEIR REPRESENTATIVES? (The 14th Amendment is catholic in operation.)

That appellant believes 28 U.S.C.A., Sec. 1253, confers jurisdiction of this appeal upon this Court.

IN SUPPORT OF HIS CONTENTION THAT THE DISTRICT COURT SHOULD HAVE ASSUMED JURISDICTION AND GRANTED RELIEF, APPELLANT SUBMITS THE FOLLOWING:

Judge Murrah accepted as a predicate opinions of courts of last resort dealing with states that have no comparable constitutional provisions to our Article 5, Sections 9 to 10(j), inclusive. I quote these:

> "Sec. 9. The Senate—Membership—Term of Office. The Senate, except as hereinafter provided, shall consist of not more than forty-four members, whose term of office shall be four years: Provided, That one senator elected at the first election from each even numbered district shall hold office until the fifteenth day succeeding the regular state election in Nineteen Hundred and Eight, and one elected from each odd numbered district at said first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Ten: And Provided Further, That in district electing two senators, the two elected at the first election shall cast lots in such manner as the Legislature may prescribe to determine which shall hold the long and which the short term.
>
> "Sec. 9(a). Number of Senatorial Districts—When Apportioned. At the time each senatorial apportionment is made after the year Nineteen Hundred and

Ten the State shall be divided into forty-four districts, to be called senatorial districts, each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given each county in addition to the forty-four senators and the whole number to that extent. Said districts shall be numbered from One to Forty-four inclusive, and each of said districts shall contain as near as may be an equal number of inhabitants, such population to be ascertained by the next preceding Federal census, or in such manner as the Legislature may direct, and shall be in as compact form as practicable and shall remain unaltered until the next decennial period, and shall at all times consist of contiguous territory.

"Sec. 9(b). Limitation Upon the Creation of Districts. No county shall ever be divided in the formation of a senatorial district except to make two or more senatorial districts wholly in such county. No town, and no ward in a city when constituting only one voting precinct, shall be divided in the formation of a senatorial district, nor shall any senatorial district contain a greater excess in population over an adjoining district in the same county than the population of a town, or ward in a city, constituting only one voting precinct therein, adjoining such district. Towns, and wards in cities, constituting only one voting precinct, which may, from their location, be included in either of two senatorial districts, shall be so placed as to make such districts most nearly equal in number of inhabitants.

"Sec. 10. House of Representatives—Membership—Term of Office. The House of Representatives, until otherwise provided by law, shall consist of not more than one hundred and nine members who shall hold office for two years: Provided, That the representatives

elected at the first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Eight: And, Provided, That the day on which state elections shall be held shall be fixed by the Legislature.

"Sec. 10(a). Meeting of First Legislature. The first Legislature shall meet at the seat of government upon proclamation of the Governor on the day named in said proclamation, which shall not be more than thirty days nor less than fifteen days after the admission of the State into the Union.

"Sec. 10(b). Decennial Apportionment. The apportionment of this State for members of the Legislature shall be made at the first session of the Legislature after each decennial Federal census.

"Sec. 10(c). Ratio of Representation in the House. The whole population of the State as ascertained by the Federal census, or in such manner as the Legislature may direct, shall be divided by the number one hundred and the quotient shall be the ratio of representation in the House of Representatives for the next ten years succeeding such apportionment.

"Sec. 10(d). Representation to Each County. Every county having a population equal to one-half of said ratio shall be entitled to one representative; every county containing said ratio and three-fourths over shall be entitled to two representatives, and so on, requiring after the first two an entire ratio for each additional representative: Provided, That no county shall ever take part in the election of more than seven representatives.

"Sec. 10(e). Additional Representation Apportioned During the Decennial Period. When any county shall have a fraction above the ratio so large that being multiplied by five the result will be equal to one or

more ratios, additional representatives shall be apportioned for such ratio among the several sessions of the decennial period. If there are two ratios, representation shall be allotted to the fourth and third sessions, respectively; if three, the third, second and first sessions, respectively; if four, to the fourth, third, second, and first sessions, respectively.

"Sec. 10(f). Additional Representation to Counties in a Representative District. Any county forming with another county or counties a representative district during one decennial period if it has acquired sufficient population, at a fixed decennial period, shall be entitled to an additional representative, if there shall be left in the district from which it shall have been separated a population sufficient for a representative. No such change shall be made except at the regular decennial period for the apportionment of representatives.

"Sec. 10(g). Reduction of Representation in Certain Counties. If in fixing any decennial ratio, a county previously a separate representative district shall have less than the number required by the ratio for a representative, such county shall be attached to a county adjoining it and become a part of such representative district.

"Sec. 10(h). Restrictions on the Division of Counties in Forming Representative Districts. No county shall ever be divided in the formation of representative districts except to make two or more representative districts in such county. No town, or ward in a city, where it constitutes only one voting precinct, shall be divided in the formation of representative districts, nor shall any representative district contain a greater excess in population over an adjoining district in the same county than the population of a town or ward in a city, constituting only one voting precinct adjoining such district. Counties, towns, or wards in cities, con-

stituting only one voting precinct, which from location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants.

"Sec. 10(i). Apportionment—Subject to Veto of the Governor. Ascertaining the ratio of representation according to the Federal census, or such other enumeration as the Legislature may provide, and attaching any county, previously having a separate representative but found to have less than the number required by the ratio, to an adjoining county; and determining the number of representatives each county or district shall be entitled to, and for what sessions of the Legislature within the next decennial period; and apportioning the Senators, shall be done by the Legislature and be presented to the Governor for his approval in the same manner as other bills which may be passed by the Legislature.

"Sec. 10(j). Apportionment—Review by Supreme Court. An apportionment by the Legislature shall be subject to review by the Supreme Court at the suit of any citizen, under such rules and regulations as the Legislature may prescribe. And such court shall give all cases involving apportionment precedence over all other cases and proceedings; and if said court be not in session, it shall convene promptly for the disposal of the same."

Thus it is manifest that in the tendered case the court could apportion or order apportioned Oklahoma for legislative purposes for a complete and comprehensive plan is presented by the provisions just quoted.

Judge Murrah treated the rule in *Dyer* v. *Kazuhisa Abe* (cited in his opinion and relied on by appellant) as limited to a territory of the United States and not applicable to a

state. In this he was mistaken and Judge McLaughlin so states on page 236 of the opinion.

The authorities collated and treated by Judge Wallace, together with his opinion thereon based (which by this reference is made a part hereof), as I see it thoroughly support appellant's position.

Judge Wallace agrees with appellant in principle but thinks he is entitled to other and different relief than injunction or mandamus. In dealing with a deprivation or serious infringement of a right guaranteed by the Constitution of the United States the federal courts have plenary power. *Youngstown Sheet and Tube Company* v. *Sawyer*, 103 F. Supp. 569, 343 U.S. 579; *Sterling, Governor* v. *Constantine*, 287 U.S. 378. The court's choice between the philosophies of the two opinions will be, I think, determinative. Both state succinctly and clearly the issues, and then separate in their legal conclusions.

In bringing and prosecuting this suit, I have thought that because of the constitutional provisions hereinbefore quoted spelling out the plan of reapportionment that task was administrative or ministerial whether performed by the legislature originally or by the state court on review. I cannot escape this conclusion in view of that language.

The historian will remember that President Theodore Roosevelt opposed the adoption of the Constitution of Oklahoma upon the ground that it contained too much legislation and it is said by some who participated in the struggle over statehood that this detailed provision for maintaining equality of representation was one of the articles seriously

objected to by the President of the United States—because it curtails, far beyond the usual, legislative liberty in such matters.

Legal rights are divided into two—the rights of persons and the rights of things. For many years the federal courts devoted themselves largely to the protection of the material—the rights of things. In the struggle for survival of constitutional government this Court has inclined to and as a matter of necessity now lays most stress on the rights of persons. It is this that gives me hope in my present undertaking.

Very respectfully,

SID WHITE,
445 Commerce Exchange Building,
Oklahoma City 2, Oklahoma.

Attorney for Appellant,

December, 1956.

A copy of the foregoing Jurisdictional Statement received this 30th day of November, 1956, and service thereof accepted.

(Signed) MAC Q. WILLIAMSON,
The Attorney General of
the State of Oklahoma;

(Signed) by FRED HANSEN,
First Assistant Attorney General
of the State of Oklahoma.

APPENDIX

FILED
June 29, 1956
Hayden M. Addington
Clerk, U. S. District Court
By Mary Bassler
Deputy

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 7144 Civil

JAMES A. RADFORD,
Plaintiff,
VERSUS
RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; and GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma,
Defendants.

COMPLAINT

COMES NOW the plaintiff, complaining of the defendants and each of them, and for cause he says:

1. That the plaintiff is a resident taxpayer of Oklahoma County, Oklahoma, a citizen and qualified elector of said County and State; and, therefore, a citizen and qualified elector of the United States; and such has ever been his status on the days and dates material hereto.

2. That the defendant Raymond Gary is the duly qualified and elected Governor of the State of Oklahoma, and such has ever been his status on the days and dates material hereto.

[APPENDIX]

3. That N. B. Johnson, Earl Welch, Albert C. Hunt, N. S. Corn, Ben T. Williams, Harry L. S. Halley, W. H. Blackbird, Denver Davison and Floyd L. Jackson are judges and members of the Supreme Court of the State of Oklahoma, as such compose the Supreme Court of the State of Oklahoma, and such has ever been their status on all the days and dates material hereto.

4. That the defendants George D. Key, Art S. Bower and Leo Winters constitute the State Election Board of the State of Oklahoma and Leo Winters is the Secretary thereof, and such has ever been the status of them and each of them on the days and dates material hereto.

5. That Oklahoma is a political subdivision of the United States, organized by enabling act and constitution as one of said states, recognizing the Constitution of the United States as the supreme law of the land and guaranteeing a republican form of government; and such has ever been the status of said political corporation on the days and dates hereinafter set forth.

6. That Okla. Const. Art. 5 Sec. 9(a) is as follows:

> "At the time each senatorial apportionment is made after the year Nineteen Hundred and Ten the State shall be divided into forty-four districts, to be called senatorial districts, each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent. Said districts shall be numbered from One to Forty-four inclusive, and each of said districts shall contain as near as may be an equal number of inhabitants, such population to be ascertained by the next preceding Federal census, or in such manner as

the Legislature may direct, and shall be in as compact form as practicable and shall remain unaltered until the next decennial period, and shall at all times consist of contiguous territory."

7. That Okla. Const. Art. 5 Sec. 10(b) is as follows:

"The apportionment of this State for members of the Legislature shall be made at the first session of the Legislature after each decennial Federal census."

8. That Okla. Const. Art. 5 Sec. 10(j) reads as follows:

"An apportionment by the Legislature shall be subject to review by the Supreme Court at the suit of any citizen, under such rules and regulations as the Legislature may prescribe. And such court shall give all cases involving apportionment precedence over all other cases and proceedings; and if said court be not in session, it shall convene promptly for the disposal of the same."

9. That Okla. Const. Art. 2 Sec. 6 reads as follows:

"The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

10. That so, to maintain equality of representation in the legislative halls of the State of Oklahoma the Legislature was and is commanded to reapportion the same after each federal census.

11. That never after the year 1910 has the Legislature complied with said mandatory command of the constitution.

12. That so the Supreme Court of the State of Oklahoma was named and erected a standby administrative

authority to make said reapportionment upon the suit of any citizen in the event the Legislature failed so to do.

13. That in and about the making of said apportionment or reapportionment, both the Legislature and the Supreme Court act administratively and ministerially in that neither has any discretion as to time or manner of making the same.

14. That though its jurisdiction, power and authority so to do has been repeatedly invoked since the year 1910, the said Supreme Court of the State of Oklahoma, though declaring all pretended acts of the Legislature to that end void and unconstitutional has refused to do and perform its mandatory administrative and ministerial duty and to make said reapportionment.

15. That now in violation of said constitutional command mandatorily requiring it so to do, the said Supreme Court of the State of Oklahoma has refused to take jurisdiction of the suit of this plaintiff and to make or take any act toward making said reapportionment.

16. That now the Legislature of the State of Oklahoma is not in session, if in fact there be any such Legislature, and the defendant Raymond Gary as Governor of the State of Oklahoma refuses and declines to call said body into session.

17. That in and about the calling of said Legislature for said purpose said Governor acts, not with discretion, but in an administrative or ministerial capacity and it is his mandatory duty so to do.

18. That by reason of and because of the shift in population since the year 1910, Oklahoma County with approximately fifteen per cent of the population of said state has only one senator—approximately two per cent of representation in the state senate.

19. That so because of and by reason of said shift in population since the year 1910 Oklahoma County having approximately fifteen per cent of the population of said state, has less than four per cent of the representation in the House of Representatives.

20. That equality of representation is the first essential of a republican form of government, is guaranteed and required by the Constitution of the United States, and this court is in duty bound to enforce the same as was recently decided in an opinion written by the Chief Justice of the United States District Court for the District of Hawaii in *Dyer* v. *Kazhuisa Abe, et al.*, reported at page 220 of 138 Federal Supplement.

21. That plaintiff has no other remedy to protect his right under the Constitution of the United States except resort to this honorable court.

WHEREFORE, premises considered, plaintiff prays:

That the presiding judge of this court consider this complaint, determine whether or not it requires consideration by a three judge court, and if so, assemble the same.

That then this honorable court cause notice to be given to the defendant Governor of the State of Oklahoma; to the defendants composing the Supreme Court of the State of Oklahoma; and to the defendants constituting the State Election Board of the State of Oklahoma; and then make and enter its order and judgment compelling reapportionment of said representation as required by the Constitution of the United States and provided for in the Constitution of Oklahoma.

That said order and judgment take the form:

1. Of a direction to the defendant Governor of the State of Oklahoma to call into session the House of Representatives and the State Senate of said state.

2. That then, when so assembled in session, said House of Representatives and State Senate of said state be commanded to make said apportionment in accordance with the Constitution of Oklahoma to effectuate the Constitution of the United States.

3. That failing so to do, then said order and judgment take the form of a command, either mandamus or mandatory injunction directing the defendants composing the Supreme Court of the State of Oklahoma to make said apportionment as by law required.

4. That this honorable court restrain and enjoin the defendants named as constituting the State Election Board from holding any further election to elect members of the House of Representatives and State Senate of the State of Oklahoma by districts, because there are no such districts, and order and direct said defendants to hold said election for the purpose of electing said members of the House and said members of the Senate from the state at large.

5. That the plaintiff have all such other and further relief as he is entitled to receive to effectuate his said constitutional right, together with his cost herein laid out and expended.

JAMES A. RADFORD
Plaintiff

By SID WHITE
His Attorney

Comes now Sid White who states on his oath:

That he is attorney for the plaintiff James A. Radford, that the said James A. Radford is absent from the county and from this jurisdictional district.

That, therefore, he, the said Sid White, verifies this petition; and that the matters and facts hereinbefore set forth are true.

SID WHITE

(Seal)

Subscribed and sworn to before me by Sid White, this the 28th day of June, 1956.

GORMA JEAN ROWDEN
Notary Public

My Commission expires: Dec. 21, 1957

FILED
July 31, 1956
Hayden M. Addington
Clerk, U. S. District Court
By Mary Bassler
Deputy

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 7144 Civil

JAMES A. RADFORD,
Plaintiff,

VERSUS

RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma and JOHN D. CONNER, State Treasurer of the State of Oklahoma,

Defendants.

APPLICATION FOR PERMISSION TO MAKE ADDITIONAL PARTIES DEFENDANT AND FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

Comes now the plaintiff, James A. Radford, showing to the court:

That A. S. J. Shaw, State Auditor, and John D. Conner, State Treasurer, both of the State of Oklahoma, are proper if not necessary parties hereto; as appears from the attached Amendment to Complaint.

That the plaintiff desires to make said auditor and treasurer parties defendant and to, in the interest of clarity, amend his complaint in the manner set forth in the attached amendment to complaint.

WHEREFORE, plaintiff prays:

That said A. S. J. Shaw, State Auditor, and John D. Conner, State Treasurer, be made parties hereto and that plaintiff be permitted to file the amendment to his complaint which is hereto attached.

SID WHITE
ATTORNEY FOR PLAINTIFF
Sid White
445 Commerce Exchange Bldg.
Oklahoma City 2, Oklahoma

A copy of the foregoing Application, together with an attached copy of the proposed Amendment, received this 31st day of July, 1956.

FOR THE ATTORNEY GENERAL
FRED HANSEN
1st Asst. Atty. Gen.

ORDER

Now on this the 31st day of July, 1956, is presented to the court the foregoing Application of the plaintiff, and it appearing therefrom right and proper so to do, IT IS ACCORDINGLY ORDERED:

That A. S. J. Shaw, State Auditor, and John D. Conner, State Treasurer, both of the State of Oklahoma, be and they hereby are made parties defendant in the above styled and numbered cause, and it is ordered that they be forthwith served with process.

That plaintiff be and he hereby is permitted to file forthwith his Amendment to Complaint hereto attached.

WITNESS, the undersigned, Judge of the court named in the caption.

W. R. WALLACE
Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 7144 Civil

JAMES A. RADFORD,
Plaintiff,
VERSUS
RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma and JOHN D. CONNER, State Treasurer of the State of Oklahoma,
Defendants.

AMENDMENT TO COMPLAINT

Comes now the plaintiff, leave of court having been first obtained, repleading, restating and relying upon as

fully and completely as if herein literally set forth all and singular the allegations of his original complaint and for his amendment thereto, on oath, further says:

1. That this suit is filed and prosecuted to invoke the equitable jurisdiction of this honorable court to end a long-continued deprivation of due process of law, the equal protection of the law and equality of suffrage and representation; all as guaranteed by the Constitution of the United States; practiced upon this plaintiff and those other citizens of the State of Oklahoma by the defendants named in the original complaint.

2. That all and each the mandatory injunctions or writs in form mandamus prayed by plaintiff are ancillary to and to aid and effectuate said equitable jurisdiction.

3. That the defendant A. S. J. Shaw is the State Auditor of the State of Oklahoma, and as such is charged by the constitution with auditing before paying all claims against funds belonging to said state.

4. That the defendant John D. Conner is State Treasurer of the State of Oklahoma and is charged by the constitution with safely keeping the funds of said state and paying nothing therefrom except upon a warrant so audited and issued by the state auditor as aforesaid.

5. That, therefore, it will materially effectuate any relief granted if said defendants be restrained and enjoined as follows, to-wit:

6. That said state auditor should be restrained from issuing any warrant against the funds of the State of Oklahoma in paying salary, per diem, or other expenses of any person now claiming to be a representative or senator of the State of Oklahoma.

7. That said defendant state auditor should be restrained and enjoined from issuing any warrant in pay-

ment of any appropriation made by those now claiming to represent the people and to compose the legislative department of the State of Oklahoma.

8. That the defendant state treasurer should be restrained and enjoined from paying any warrant issued by the defendant state auditor in payment of salary, per diem, or expenses of any person now claiming to be a member of the legislature of the State of Oklahoma, and from paying any warrant issued by the defendant state auditor because of any appropriation of public funds made by those who now claim to represent the people and to compose the legislative department of the State of Oklahoma.

WHEREFORE, plaintiff prays:

FIRST, as in his original complaint; and

SECOND, that said defendant state auditor be restrained and enjoined as aforesaid; and

THIRD, that said defendant state treasurer be restrained and enjoined as aforesaid; and

FOURTH, that plaintiff have all such relief as shall be necessary to effectuate his constitutional right to due process of law, the equal protection of the law, equal suffrage and equality of representation in the legislative department of the State of Oklahoma, as guaranteed by the Constitution of the United States, whether said relief be specifically herein prayed or not.

JAS. A. RADFORD
Plaintiff

SID WHITE
Attorney for Plaintiff

Subscribed and sworn to before me by James A. Radford, this the 31st day of July, 1956.
(SEAL)

MARALYN SUE PEYTON
Notary Public

My commission expires: May 12, 1958

FILED
July 16, 1956
Hayden M. Addington
Clerk, U. S. District Cour
By Mary Bassler
Deputy

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 7144 Civil

JAMES A. RADFORD,
Plaintiff,
VERSUS

RAYMOND GARY, Governor of the State of Oklahoma; TH HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA THE STATE SENATE OF THE STATE OF OKLAHOMA; N. E JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRI DENVER DAVISON and FLOYD L. JACKSON, composing th Supreme Court of the State of Oklahoma; and GEORGE D KEY, ART S. BOWER and LEO WINTERS, constituting th State Election Board of the State of Oklahoma,
Defendants.

MOTION TO DISMISS

The defendants move the court as follows:

1. To dismiss the action because the court lacks juris diction over the subject matter.

2. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

MAC Q. WILLIAMSON
MAC Q. WILLIAMSON
Attorney General of Oklahoma

FRED HANSEN
FRED HANSEN
First Assistant Attorney General

ATTORNEYS FOR DEFENDANTS
State Capitol
Oklahoma City, Oklahoma

NOTICE OF MOTION

TO: SID WHITE
Attorney at Law
Commerce Exchange Building
Oklahoma City, Oklahoma

Please take notice that the undersigned will bring the above motion on for hearing before this court on the 25th day of July, 1956, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

MAC Q. WILLIAMSON
MAC Q. WILLIAMSON
Attorney General of Oklahoma

FRED HANSEN
FRED HANSEN
First Assistant Attorney General

ATTORNEYS FOR DEFENDANTS
State Capitol
Oklahoma City, Oklahoma

STATE OF OKLAHOMA)
) SS. Affidavit of Mailing
OKLAHOMA COUNTY)

Lucile Williams being duly sworn upon oath, deposes and says that on the 13th day of July, 1956, she enclosed a copy of the attached:

MOTION TO DISMISS AND NOTICE OF MOTION

in an envelope to: Mr. Sid White
Attorney at Law
Commerce Exchange Building
Oklahoma City, Oklahoma

and, with postage thereon fully prepaid, deposited the same in the United States Post Office at the State Capitol, Oklahoma City 5, Oklahoma.

LUCILE WILLIAMS

Subscribed and sworn to before me this 13th day of July, 1956.

DOROTHY T. HILL
Notary Public

(SEAL)

My Commission Expires: May 14, 1960.

[APPENDIX]

FILED
Jul 27 1956
HAYDEN M. ADDINGTON
Clerk, U. S. District Court
By Mary Bassler
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NUMBER 7144—Civil

JAMES A. RADFORD,
Plaintiff,
VERSUS
RAYMOND GARY, ET AL.,
Defendants.

ORDER

Having been notified that an application for injunction has been filed in the above entitled and numbered cause and that it is an action required by Act of Congress to be heard and determined by a specially constituted District Court of three judges:

IT IS ORDERED that Alfred P. Murrah, United States Circuit Judge for the Tenth Circuit, W. R. Wallace, United States District Judge for the Western District of Oklahoma, and Ross Rizley, United States District Judge for the Western District of Oklahoma, shall constitute such court.

Dated this the 25th day of July, A.D. 1956.

(Signed) Sam G. Bratton
Chief Judge

United States Court of Appeals
Tenth Circuit

FILED
Nov 2 1956
R. LEE JENKINS
Clerk, U. S. District Court
By Mabel E. Borland
Deputy

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 7144 Civil

JAMES A. RADFORD,
Plaintiff,
VERSUS
RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; and GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma,
Defendants.

Before MURRAH, Circuit Judge, and
WALLACE and RIZLEY, District Judges.

MURRAH, Circuit Judge.

This three-judge court was convened under Title 28 U.S.C.A. Section 2281, to hear the complaint of the plaintiff to the effect that the existing apportionment statutes of the State of Oklahoma violate the plain mandate of the Oklahoma Constitution and operate to deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The essential allegations are that the complainant is a citizen of Oklahoma and resident and voter in the most populous county in the State; that because of a shift in the population since 1910, the county wherein the complainant resides and votes, now has approximately fifteen per cent of the total population of the State, with approximately two per cent representation in the State Senate and less than four per cent in the House of Representatives; that since 1910, the Legislature of the State of Oklahoma has failed to reapportion the State as required by Article V, Sections 9(a) and 10 of the Oklahoma Constitution; that the defendant, Governor of the State, has failed and refused to call a special session of the Legislature for the purpose of effecting legislative compliance with the constitutional mandate; that the Supreme Court of the State of Oklahoma has repeatedly failed and refused to require compliance with the Constitution; and that the complainant is therefore without state remedy.

The prayer is for a writ of mandamus to the Governor to call the Legislature into session for remedial legislation, and when so called, the Legislature be commanded by this court to make apportionments required by the Oklahoma Constitution and equal protection clauses of the Federal Constitution; and that failing to do so, the individual members of the Supreme Court of the State of Oklahoma be commanded by mandamus or mandatory injunction to make the apportionment as by law required. Meanwhile, the court is asked to restrain and enjoin the individual members of the State Election Board from holding any election to elect members of the House of Representatives or the State Senate of the State of Oklahoma by presently constituted districts; that until constitutional reapportionment is effected, the members of the House of Representatives and the Senate be elected at large. In the event of the election and certification of representatives and senators from the existing districts, we are asked to enjoin the State Auditor and the State Treasurer from paying the per diem,

salaries and expenses from appropriations made by the so-called de facto Legislature.

This being a civil action to redress the deprivation, under color of state law, a right secured by the Constitution of the United States; and since injunctive relief is sought against the operation of a state statute by state officers, all of the elements of three-judge jurisdiction are present. See 28 USCA 1343(3) and 2284.

The case comes on for consideration on the defendants' motion to dismiss, by which they admit all of the essential allegations of the complainant. And, the issues are further sharpened by the Attorney General's candid admission that the Oklahoma Legislature has, since 1910, failed and refused to reapportion the State of Oklahoma in compliance with the plain mandate of the Constitution of the State of Oklahoma.

On at least three occasions, the question of reapportionment has been before the Supreme Court of the State of Oklahoma. In each case, the court has declared the right of each citizen "to have the state apportioned in accordance with the provisions of the Constitution, and to be governed by a Legislature which fairly represents the whole body of the electorate, elected as required by the provisions of the Constitution." *Jones* v. *Freeman*, 146 P.2d 564, 571; and see *Latting* v. *Cordell*, 172 P.2d 397; *Romang* v. *Cordell*, 243 P.2d 677. And, in each instance, the Oklahoma Court has said emphatically that the existing reapportionment statutes have failed to comply with the requirements of the Constitution. The question in each case was not whether the Supreme Court had jurisdiction to review legislative reapportionment acts upon constitutional grounds, but whether it was constitutionally empowered to "revise or correct" the apportionment when the Legislature refused to act. In each case the Oklahoma court declined to grant any relief on the grounds that the mandate of the Constitution was addressed solely to the Legislature. And, in the

event of the failure of the Legislature to act, the remedy was in the hands of the sovereign people who may (1) elect legislators who will comply with the Constitution or prescribe rules and regulations whereby the Supreme Court may do so; (2) initiate a proper statute; or (3) amend the Constitution to take the power of apportionment from the Legislature and vest it in a ministerial board subject to the coercive power of the court. See *Romang* v. *Cordell*, *supra*, p. 681.

This concept of the separation of powers finds ready support in the federal cases where the federal Constitution has been invoked to require state action. The first of the contemporary cases (*Colegrove* v. *Green*, 328 U.S. 549) involved the complaint of voters in a populous congressional district in the State of Illinois. It was alleged that the failure of the Legislature of the State of Illinois to redistrict the State in accordance with the Reapportionment Act of August 8, 1911 (37 Stat. 13, as amended, 2 USCA 2[a]) operated to deprive the complaining voters of the rights and privileges secured to them by the Constitution and laws of the United States. Particularly it was alleged that changes in population in the congressional district since the State Reapportionment Act of 1901 had diluted the voters' rights in the populous districts to the point of deprivation of their constitutionally guaranteed equality of *sufferage*. On authority of *Wood* v. *Broom*, 287 U.S. 1, the Supreme Court affirmed the dismissal of the complaint on the grounds that the Illinois Act of 1901 did not violate the Federal Reapportionment Act of June 8, 1929 (46 Stat. 21).

But the court was not content to rest its decision on the question of state compliance with federal law. The majority went on to explore the broader question of the competence of the federal courts to grant relief, even in the face of a deprivation of a federally protected *sufferage* right, finally concluding that the issue was one of a "peculiarly political nature and therefore not meet for judicial determination." See *Colegrove* v. *Green*, *supra*, p. 552. The court took the

view that the Federal Constitution Art. 1, § 4) had "conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility." And, said the court, "If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people." Id. p. 554. The issue was thus committed to the "exclusive control of Congress."

There was a strong dissent, not only in support of federal jurisdiction, but the propriety of its exercise in order to redress what was deemed a flagrant deprivation of a right secured to the complainants by the Federal Constitution. The dissenters thought that the failure to equitably apportion the congressional districts, thus diluting the weight and influence of the citizen's vote, was quite as much a deprivation of his constitutional right as the right to vote and have it counted, which was ardently vouchsafed in *Nixon* v. *Herndon*, 273 U.S. 536; *Ex Parte Yarbrough*, 110 U.S. 651; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *Smith* v. *Allwright*, 321 U.S. 649.

But the majority view again prevailed in the closely analogous case of *McDougal* v. *Green*, 335 U.S. 281, wherein an injunction was sought against a statute which allegedly discriminated against the most populous counties in the State of Illinois in its provisions for the formation and recognition of a new political party in that State.

And, the majority view was again upheld in a case more similar to ours in which the complaint challenged the validity of Georgia's County Unit Election system. As against the contention of the complaining residents of the most populous counties in the State that the "voters in that county have an average of about one-tenth of the weight of those in other counties" amounting to an unconstitutional discrimination, the court declined any equitable re-

lief on the grounds that the case posed only state "political issues" with which the federal courts should not interfere. See *South* v. *Peters*, 339 U.S. 276, citing *McDougal* v. *Green*, *supra*, and *Colegrove* v. *Green*, *supra*.

Constrained by these authoritative decisions, a three-judge court refused to exercise equity jurisdiction in a suit by voters in Pennsylvania which challenged the reapportionment statutes of that State on the grounds that they had the practical effect of substantially disfranchising the complaining qualified voters. *Remmy* v. *Smith*, 102 F. Supp. 708. The court reasoned that if the federal courts should not intervene where national representation was involved, a fortiori it should not intervene where, as there and here, only state representation was involved. While the court made a point of the unexhausted remedies in the state courts, and observed that the general assembly of the Commonwealth then in session might yet afford a remedy, it was nevertheless careful not to tread on the political ground which the Supreme Court had so unequivocally set apart as legislative domain.

The complainant relies heavily on *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, where the federal court in the Territory of Hawaii granted appropriate relief against discriminatory election laws of the Territory. But that court was careful to point out the fundamental distinction between the questions posed in *Colegrove* v. *Green*, *supra*, and the problem there, saying, "The Territory of Hawaii does not have the same relation to this Court that the State of Illinois has to a federal court within its boundaries" p. 234. In any event, we are unable to distingish our facts from those involved in the *Colegrove* and *McDougal* cases.

Finally, we are asked to reappraise *Colgrove* and its successors in the light of the philosophy of the recent civil rights cases (*Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 349 U.S. 294; *Bolling* v. *Sharpe*, 347 U.S. 497) wherein the Supreme Court is said to have adopted an

entirely different concept of the transcendent effect of the equal protection clauses of the Fourteenth Amendment as applied to state political and social policies. There is nothing in the so-called civil rights cases indicating a disposition to reverse, modify or repudiate the rule so firmly established in the former cases, and it is not the function of this Court to psychoanalyze the justices of the Supreme Court in order to devine the trend of decisions. It is sufficient that the Supreme Court has authoritatively spoken on the question before us, and we are bound until it speaks again.

The motion to dismiss is sustained and the action is dismissed.

Wallace, District Judge, DISSENTING:

Historically, all courts have been reluctant to call upon judicial remedies to treat ailments properly allocable to the executive or legislative branches of government. And, the federal judiciary, in addition to holding in high regard the separation of powers, has been peculiarly aware of the co-existence of local and national law, and the need to carefully avoid unnecessary clashes between the two. Yet pursuant to the evolution of our law where it has become apparent that federal constitutional rights have been violated at the local level and only the federal judiciary stands in a position to safeguard such rights, federal intervention takes place even at the risk of local disapproval.[1]

Unquestionably, the inaction of the Oklahoma Legislature has resulted in denying the plaintiff, and others similarly located, "equal protection of the laws" just as much as if discrimination because of race, color or creed had oc-

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[1] *e.g., Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954).

curred. In this case the discrimination is geographic.[2] Although the Federal Constitution does not give rise to the individual citizen's right to vote, since this franchise springs from the bosoms of the individual states, nonetheless, where state law grants such a right each citizen must be equally protected in the operation of such law.

The Attorney General, although conceding that the plaintiff has been deprived of a right guaranteed by the Fourteenth Amendment,[3] urges that the United States Supreme Court in *Colgrove* v. *Green*[4] has unmistakably indicated that the federal judiciary will not, under any circumstances, officiate over gerrymander disputes. However, I do not so strictly read the *Colgrove* case. The critical issues there in view were not focused upon a state deprivation of equal protection of the laws. The majority opinion therein reached its conclusion based upon two factors: (1) the Federal Reapportionment Act of June 18, 1929, 46 Stat. 21, as amended, 2 U.S.C.A. § 2(a) had no requirements as to compactness, contiguity and equality in population of congressional districts;[5] and, (2) the districting issue was

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[2] In the recent decision of *Dyer* v. *Kazuhisa Abe* (D.C. Hawaii, 1956), 138 F. Supp. 220, 234, the court after referring to the recent segregation decisions remarked: "• • • The assumed delicacy of state-federal relations bowed to the principles of the Constitution. A classification which discriminates geographically has the same result. It deprives a citizen of his constitutional rights. Reasons of delicacy should no longer stay the judicial hand. The people of Hawaii need no court intervention to insure a democratic school system. They do need judicial aid in achieving a democratic legislature. *Any distinction between racial and geographic discrimination is artificial and unrealistic. Both should be abolished*" (Emphasis supplied).

[3] "Section 1. • • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" Amendment XIV. (Emphasis supplied).

[4] 328 U.S. 549 (1945).

[5] This was the sole import of *Wood* v. *Broom*, 287 U.S. 1 (1932).

"of a peculiarly political nature and therefore not meet for judicial determination" and should be corrected by Congress (or the State legislature).[6] By making reference to the State legislature's ability to deal with the problem of congressional districting, the *Colgrove* opinion inferentially touched upon the issue now before this court. However, a careful reading of the majority opinion makes it amply clear that the Supreme Court was primarily concerned with faithfully adhering to the separation of powers doctrine, and desired to defer to the Congress, a co-equal branch of the federal government, to deal with the matter of congressional districting.[7] A complete remedy lay within the control of another branch of the federal government, and inasmuch as Congress possessed the basic right to pass upon the qualifications of its own members, the Federal Judiciary

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[6] Fn. 4, *supra*, at 552.

[7] "• • • The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate.

"The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. The Constitution enjoins upon Congress the duty of apportioning Representatives 'among the several States . . . according to their respective Numbers, . . .' Article I, Sec. 2. Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. • • • To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. • • •" *Colgrove* v. *Green*, fn. 4, *supra*, pp. 554, 555, and 556.

was not going to become embroiled in such controversy. From the *Colgrove* action the instant suit is sharply distinguishable. Here, Congress has no authority to remedy the complained of wrong; and, all other remedies have been exhausted. Unless this court intervenes it is obvious no relief will ever be obtained. With no threatened conflict between the Congress and the Federal Judiciary, the question simply is, "Will the Federal Judiciary stand idly by and permit the mastication of a federally guaranteed constitutional right?" At such point the question of "political issue" or "delicacy of federal-state relationship" becomes secondary. It seems inconceivable to this court that where no other relief is available that the Federal Court does not have the power, as well as the duty in the face of admitted State violation to preserve the integrity of the Fourteenth Amendment.

The other cases cited by the Attorney General are also inapplicable. *South* v. *Peters*,[8] although recognizing the Federal courts basic jurisdiction, merely reiterates the policy of refusing to exercise equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. In the *South* case the complaint was against the manner in which the local law chose to distribute its electoral strength, admittedly a fundamental right retained by all states. Here, the controlling local law itself, in the form of a State constitutional provision is being ignored with the result that plaintiff is being denied "equal protection of the laws." *Remmey* v. *Smith*,[9] was dismissed because the action was premature in view of an untried state court remedy. Significantly, the court therein recognized that if the case had not been premature, a novel, and not yet decided question of law as to the Fourteenth Amendment existed.[10]

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[8] 339 U.S. 276 (1950).

[9] 102 F. Supp. 708 (D.C. Pa., 1951).

[10] *Ibid* at pp. 710, 711.

Clearly, this court does not have the right to grant the requested mandamus relief; however, apart from formal pleading the court can, and must, grant that relief which plaintiff's proof demonstrates him to be entitled. If the plaintiff can establish at the trial upon the merits the unconstitutionality of the presently effective apportionment provisions, such apportionment provisions should be struck down. Although such a declaration may result in some local inconvenience, the basic responsibility will remain upon the state to enact apportionment provisions which are not constitutionally offensive.[11] As recognized in the *Colgrove* majority opinion, no court can "affirmatively remap" the political districts of a state; however, we could "declare the existing electoral system invalid."[12]

The evil pointed up by the instant complaint is not new. Our would-be republican form of government has long been stigmatized by this same die-hard political parasite. The refusal of a legislature, such as the one in view, to voluntarily comply with the clear mandates of the state constitution to which such body owes its existence, is inexcusable; and, demonstrates anarchic contempt for the ideal that this government continue as one of high-principled

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[11] The dissenting opinion in the *Colgrove* case fn. 4, *supra*, p. 574, in discussing the practical effect of striking down an unconstitutional apportionment division noted: "* * * It is said it would be inconvenient for the State to conduct the election in this manner. But it has an element of virtue that the more convenient method does not have—namely, it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional."

[12] Fn. 4, *supra*, p. 553.

laws rather than degenerate into one of unprincipled *men.*[13] The plaintiff and others similarly situated have previously been denied effective relief by all available local government forums; and, I, sitting as a court of equity, cannot turn a deaf ear to the complainant with the paradoxical pronouncement, "You *do* have a federal constitutional right, but you just *don't* have any remedy!"

Respectfully, I dissent.

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13 "The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of the traditional reluctance of judicial intervention in legislative reapportionment. The whole thrust of todays' legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislatures." *Dyer* v. *Kazuhisa Abe*, fn. 2, *supra*, p. 236.

[APPENDIX]

FILED
Nov. 28, 1956
R. Lee Jenkins
Clerk, U. S. District Court
By Mabel E. Borland
Deputy

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF OKLAHOMA; JUDGES MURRAH OF THE UNITED STATES CIRCUIT COURT OF APPEALS AND WALLACE AND RIZLEY OF THE DISTRICT COURT, PRESIDING

No. 7144 Civil

JAMES A. RADFORD,
Plaintiff,
VERSUS

RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma and JOHN D. CONNER, State Treasurer of the State of Oklahoma,

Defendants,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I

Notice is hereby given that James A. Radford, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing his complaint and denying him relief, entered in this action on the 2nd day of November, 1956.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) The complaint filed by plaintiff.

(2) The application for permission to make additional parties defendant and for leave to file amendment to complaint filed by plaintiff.

(3) The order permitting plaintiff to file said application aforesaid.

(4) The amendment to complaint mentioned in the two preceding numbered paragraphs.

(5) The motion to dismiss filed by and on the part of all defendants, including those added by amendment to complaint.

(6) The order constituting a three judge court and naming the judges to participate.

(7) The order or minute denying plaintiff relief and dismissing his complaint.

(8) The majority opinion written by Judge Murrah and concurred in by Judge Rizley.

(9) The minority or dissenting opinion written by Judge Wallace.

III

The following questions are presented by this appeal:

(1) Having found that plaintiff was entitled to have the State of Oklahoma reapportioned for the purpose of electing legislative officers, was the trial court bound to provide him a remedy?

(2) Does apportionment or reapportionment as reflected by this record deny plaintiff the equal protection of

the law and due process of law as guaranteed by the Constitution of the United States?

(3) Does apportionment or reapportionment as disclosed by this record deny plaintiff a fair and equal election as guaranteed by the Constitution of the United States?

(4) Are the courts of the United States bound by the Constitution of the United States to provide plaintiff a remedy against a wrongful, unlawful or discriminatory apportionment of the State of Oklahoma for the purpose of electing a lawmaking body?

(5) Does this discriminatory practice deprive plaintiff of a government "republican in form" as guaranteed by the Constitution of the United States and are the federal courts bound by said constitution to compell such government for plaintiff at the hands of the state officers because of said provision and other mandates of the national constitution?

SID WHITE
ATTORNEY FOR PLAINTIFF
Sid White
445 Commerce Exchange Bldg.
Oklahoma City 2, Oklahoma

JAMES A. RADFORD
Plaintiff
By Sid White
His attorney

* * *

A copy of the foregoing received this the 28th day of November, 1956, and service thereof accepted and acknowledged.

MAC Q. WILLIAMSON
The Attorney General of the
State of Oklahoma
By.....
Assistant Attorney General
of the State of Oklahoma

* * *

I, Sid White, do hereby certify:

That I am a member of the bar of the Supreme Court of the United States.

That I delivered a true and perfect copy of the foregoing in the Attorney General's office to the Attorney General who executed the acceptance of service, this the 28th day of November, 1956.

SID WHITE
Attorney for Plaintiff in Error

FILED
Dec. 19 1956
R. Lee Jenkins
Clerk, U. S. District Court
By Josephine P. Gore
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 7144 Civil

JAMES A. RADFORD,
Plaintiff,

VERSUS

RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; and GEORGE D. KEY, ART S. BOWER, and LEO WINTERS, constituting the State Election Board of the State of Oklahoma,
Defendants,

ORDER OF DISMISSAL

This case having come regularly on for hearing on the 14th day of August, 1956, is hereby dismissed in accordance with the written opinion filed this the 2nd of November, 1956.

Alfred P. Murrah
Alfred P. Murrah, Circuit Judge

W. R. Wallace
W. R. Wallace, District Judge

Ross Rizley
Ross Rizley, District Judge

(Clerk's Certificate to Transcript)

United States of America, Western District of Oklahoma, ss:

I, R. Lee Jenkins, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 7144, Civil, wherein James A. Radford is Plaintiff, and Raymond Gary, Governor of the State of Oklahoma, and others are Defendants, as full, true and complete as the said transcript purports to contain and as called for by the designation included in, and made a part of, the Notice of Appeal herein.

I do further certify that a full, true and correct printed copy of said files and records (including jurisdictional statement) is now on file in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Oklahoma City, in said District, this the 20th day of December, A.D. 1956.

R. Lee Jenkins, Clerk,

(Seal) By Mabel E. Borland, Deputy.

FILED
JAN 23 1957
JOHN T. FEY, Clerk

In The
Supreme Court of the United States

OCTOBER TERM, 1956

No. 652

JAMES A. RADFORD,
Appellant,

VERSUS

RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA, THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON AND FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma; and JOHN D. CONNER, State Treasurer of the State of Oklahoma,

Appellees.

MOTION TO DISMISS

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
First Assistant Attorney General
of Oklahoma,

State Capitol,
Oklahoma City, Oklahoma,

Attorneys for Appellees.

JANUARY, 1957.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2949

In The
Supreme Court of the United States

OCTOBER TERM, 1956

No. 652

JAMES A. RADFORD,
Appellant,

VERSUS

RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA, THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON AND FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma; and JOHN D. CONNER, State Treasurer of the State of Oklahoma,

Appellees.

MOTION TO DISMISS

Appellees in the above-entitled case move to dismiss on the ground that the questions presented in appellant's "Jurisdictional Statement" herein are so unsubstantial as to not need further argument.

In support of said motion to dismiss appellees call attention:

(1) To the prayer of appellant's "Complaint" in the United States District Court for the Western District of Oklahoma (Appendix V and VI of said jurisdictional statement), wherein appellant asked said court to:

> "* * * cause notice to be given to the defendant Governor of the State of Oklahoma; to the defendants composing the Supreme Court of the State of Oklahoma; and to the defendants constituting the State Election Board of the State of Oklahoma; and then make and enter its order and judgment compelling reapportionment of said representation as required by the Constitution of the United States and provided for in the Constitution of Oklahoma.
>
> "That said order and judgment take the form:
>
> "1. Of a direction to the defendant Governor of the State of Oklahoma to call into session the House of Representatives and the State Senate of said state.
>
> "2. That then, when so assembled in session, said House of Representatives and State Senate of said state be commanded to make said apportionment in accordance with the Constitution of Oklahoma to effectuate the Constitution of the United States.
>
> "3. That failing so to do, then said order and judgment take the form of a command, either mandamus or mandatory injunction directing the defendants composing the Supreme Court of the State of Oklahoma to make said apportionment as by law required.
>
> "4. That this Honorable Court restrain and en-

join the defendants named as constituting the State Election Board from holding any further election to elect members of the House of Representatives and State Senate of the State of Oklahoma by districts, because there are no such districts, and order and direct said defendants to hold said election for the purpose of electing said members of the House and said members of the Senate from the state at large.

"5. That the plaintiff have all such other and further relief as he is entitled to receive to effectuate his said constitutional right, together with his cost herein laid out and expended."

(2) To appellees' "Motion to Dismiss" (Appendix XII and XIII of said jurisdictional statement), wherein appellees moved said District Court:

"1. To dismiss the action because the Court lacks jurisdiction over the subject matter.

"2. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted."

(3) To the majority opinion (145 F. Supp. 541) of said District Court in said case prepared by Circuit Judge Murrah and concurred in by District Judge Rizley (Appendix XVI and XXII of said jurisdictional statement); and

(4) To the decisions of the State and Federal Courts, including decisions of the Supreme Court of Oklahoma and of this Court, cited and followed in said opinion.

WHEREFORE, premises considered, appellees respectfully ask the Court to dismiss the appeal of the

appellant, James A. Radford, and for such other and equitable relief as the Court may deem proper.

Respestfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
First Assistant Attorney General
of Oklahoma,

State Capitol,
Oklahoma City, Oklahoma,
Attorneys for Appellees.

JANUARY, 1957.

FEB 11 1957

JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 652

JAMES A. RADFORD,
Appellant,

VERSUS

RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER, and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma; and JOHN D. CONNER, State Treasurer of the State of Oklahoma,

Appellees.

BRIEF OPPOSING MOTION TO DISMISS

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February, 1957.

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RAYMOND GARY, Governor of the State of Oklahoma; THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA; THE STATE SENATE OF THE STATE OF OKLAHOMA; N. B. JOHNSON, EARL WELCH, ALBERT C. HUNT, N. S. CORN, BEN T. WILLIAMS, HARRY L. S. HALLEY, W. H. BLACKBIRD, DENVER DAVISON and FLOYD L. JACKSON, composing the Supreme Court of the State of Oklahoma; GEORGE D. KEY, ART S. BOWER, and LEO WINTERS, constituting the State Election Board of the State of Oklahoma; and A. S. J. SHAW, State Auditor of the State of Oklahoma; and JOHN D. CONNER, State Treasurer of the State of Oklahoma,

Appellees.

BRIEF OPPOSING MOTION TO DISMISS

Appellant appended to his jurisdictional statement the entire judgment roll to the end that the Court might have ready access to information concerning the subject matter in controversy.

It is noteworthy that in addition to specific forms of relief, he prayed in paragraph 4 of his amendment to complaint at Appendix XI:

> "FOURTH, that plaintiff have all such relief as shall be necessary to effectuate his constitutional right to due process of law, the equal protection of the law, equal suffrage and equality of representation in the legislative department of the State of Oklahoma, as guaranteed by the Constitution of the United States, whether said relief be specifically herein prayed or not."

The justiciable equation is not static but (that the Constitution may endure) expands from time to time to embrace each new exigency arising in human affairs. An example is the judicial enlargement of the Fourteenth Amendment's office (recognized to have been adopted originally for the protection of the emancipated salves) to cover with its mantle the right of every person.

> —*Santa Clara County* v. *Southern Pacific R. R. Co.*, 18 Fed. 397, *affirmed*, 118 U.S. 394, 30 L. Ed. 118.

I am further confirmed in the conclusion by reading:

The article entitled "Contemporaneous and Subsequent Practical Construction", presented as a prologue to the Constitution in that volume of U.S.C.A. first concerned with the instrument, and Article 1, Sections 1 to 9, inclusive, thereof.

The second paragraph of Section 11 under title "Equity" treated in American Jurisprudence Volume 19 at page 45, which is as follows:

"The equity jurisdiction which was conferred on inferior courts of the United States by the Judiciary Act of 1789, and continued by the Judicial Code, is that of the English court of chancery at the time of the separation of the two countries. The procedure in the Federal courts is now governed by the Federal Rules of Civil Procedure."

Section 12 of the same treatise and it is as follows:

"New or Novel Cases; Adaptation of Old Rules.—It is the duty of a court of equity to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy. Thus, by the adaptation of old rules to new cases, the jurisdiction of equity may be said to be constantly growing and expanding. While the court, in the exercise of its power to accord extraordinary relief, is restrained by fixed rules and established principles, a want of jurisdiction is not inferred from the novelty of the disputed question."

Passing to the question of jurisdiction: U.S.C.A., Title 28, Sec. 1343, is as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

As amended Sept. 3, 1954, c. 1263, Sec. 42, 68 Stat. 1241."

So far as my research goes this statute has not received judicial notice in a like cause save in *Dyer* v. *Kazuhisa Abe, et al., infra*, where it and its companion, 42 U.S.C.A. 1983, were read and applied in accordance with appellant's theory.

42 U.S.C.A., Sec. 1983, reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. Sec. 1970."

Early in this century this Court accepted the statute just quoted as authority, in a proper case, to an inferior court of the United States for the issuance of a writ of mandamus to protect a citizen in the exercise of his civil right to vote.

—*Jackson W. Giles, Appellant* v. *E. Jeff Harris, William A. Gunter, Jr., and Charles B. Teasley, Board of Registrars of Montgomery County, Alabama*, 47 L. Ed. 909.

Emulating the example of the English Chancery Court (as the federal courts of *nici prius* do according to American Jurisprudence, Vol. 19, Sec. 11, *supra)* the "rights of persons" will be preferred by these inferior courts above

the "rights of things." It would seem that to enjoy equal representation (stressed as its importance is in the Declaration of Independence) is an absolute, inalienable, personal right under our form of government; whereas, the right to hold and use property is among the "rights of things", relative and subject to regulation. Yet this Court is committed to the doctrine that inferior federal courts have plenary power to protect property rights.

—*Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569, 343 U.S. 579;

Sterling, Governor v. *Constantine*, 287 U.S. 378.

Nor do I agree with the learned attorney general's intimation that an order of the trial court would not be effective. In this connection it is well to remember that remedies for the violation of civil rights are twofold—civil and criminal.

It may be that the departments of Oklahoma have mistaken the deterring "delicacy" (*Dyer* v. *Abe*, 138 F. Supp. 220) of this Court for an admission of impotency. It does seem that those departments have enlarged the rule of supremacy into a sort of *lese majesty*—each assuming for itself a place above and beyond the law. This cannot be.

I have thought that the Legislature, mandatorily commanded to apportion by the Constitution and by the instrument told exactly when and how to accomplish this, did not act in its capacity as a discretionary lawmaking body, but rather in that of an administrative or ministerial agency, and so subject to mandamus.

—*Jenkins, et al.* v. *Knight, Governor*, 293 P.2d 6.

It is my studied opinion that should the Supreme Court of Oklahoma read the word "review" as do the lexicographers (and as doubtless did those who adopted the constitution with their votes) it would accept the same as conferring power upon that body to *(de novo,* so to speak) "revise" an abortive legislative act and file its revision with the repository of all apportionment measures—the secretary of state. This would avoid any departmental clash. The Court, however, absolves itself from this unpleasant duty by refusing to so read the word "review" as including power to "revise."

—*Jones* v. *Freeman,* 146 P.2d 564.

With this change in its attitude (reading the Constitution for authority to enforce its mandate, rather than captiously to evade its plan) the judges constituting an administrative and ministerial agency, would have no difficulty in performing its function and restoring a republican form of government in Oklahoma; and so are likewise subject to mandamus.

The original Constitution of Arkansas gave her Supreme Court no standby or reviewing power in the premises. That state in 1937 adopted an amendment patterned after our Article 5, Sections 9 to 10(j), conferring upon that body power to revise, and then the agency accomplishes its function in the manner indicated.

—*Pickens* v. *Board of Apportionment,* 246 S.W.2d 556.

So to here grant appellant relief does not involve "remapping Oklahoma" or the exercise of any other power entrusted to the legislative or judicial departments as such.

It only necessitates compelling them as administrative agencies (one or both) to divide the state into districts of equal population for the election of public officers in accordance with the blue print published by its Constitution. The controls are geography and mathematics—quite dissimilar to legislative or judicial guides.

Recently the public press, in front page editorials and otherwise, severely castigated our legislative, judicial and executive officers. This because of an election scandal in Wagoner County involving the use of illegal absentee ballots and the misuse of public funds. According to that institution, this was the bitter fruit of a failure to apportion as commanded by the Constitution, because by so failing, the state senate could maintain uninterruptedly an election machine built over forty years and now serving the oligarchy of public officers, organized and existing on a state level.

It is not refreshing to contemplate this chapter of our history and my purpose in relating it is twofold: First, it may explain the language used by Judge Wallace in his opinion as follows: *"The refusal of a legislature, such as the one in view, to voluntarily comply with the clear mandates of the state constitution and to which such body owes its existence, is inexcusable; and, demonstrates anarchic contempt for the ideal that this government continue as one of high-principled laws rather than degenerate into one of unprincipled men."* And, second, if the jurisdiction be returned to the District Court, and he issue an order but defendants ignore to result in another such outrage, this may provoke a judge less patient with legislative pro-

crastinations and subterfuges (in form the introduction of resolutions proposing the amendment of a constitution too plain for their purposes) to call a grand jury and direct that inquisitorial body to measure the conduct of the defendants by the criminal statutes. There are more than one denouncing those who conspire to deprive citizens of rights guaranteed by the Constitution and laws of the United States.

With an abiding conviction to a moral certainty that the Constitution will prevail over the policy of "delicacy" so unsuited to this society, I submit appellant's cause.

Very respectfully,

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February, 1957.

No. 652. RADFORD *v.* GARY, GOVERNOR OF OKLAHOMA, ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam:* The judgment is affirmed. *Colegrove* v. *Green*, 328 U. S. 549; *Kidd* v. *McCanless*, 352 U. S. 920.

Sid White for appellant. *Mac Q. Williamson*, Attorney General of Oklahoma, and *Fred Hansen*, First Assistant Attorney General, for appellees. Reported below: 145 F. Supp. 541.